85-1192

No.

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

CITY OF SHEPHERDSVILLE, KENTUCKY, and BEN STILLWELL - - - - - Petitioners

versus

PAUL DALE RYMER - - - - - Respondent

On Writ of Certiorari to The United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

MARK E. EDISON
PORTER & EDISON
217 Buckman Street
Shepherdsville, Kentucky 40165
Telephone: (502) 543-2296
Counsel for Petitioners

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

HOP

QUESTIONS PRESENTED FOR REVIEW

1. Did the United States Court of Appeals for the Sixth Circuit commit error in affirming a judgment for the Respondent on the basis that the Petitioner, City of Shepherdsville, Kentucky, either failed to train its police officers or trained them in such a reckless or grossly negligent manner that the misconduct was inevitable or substantially certain to result when Respondent failed to plead or prove this as a cause of action.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding in the Court whose judgment is sought to be reviewed are named in the caption of this Petition as filed in this Court.

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No. _____

IN THE

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CITY OF SHEPHERDSVILLE, KENTUCKY and
BEN STILLWELL - - - - - - *Petitioners*

v.

PAUL DALE RYMER - - - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on October 28, 1985.

OPINIONS BELOW

The October 28, 1985, opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is printed as *Rymer* v. *Davis,* 225 F. 2d 756 (1985), and is reprinted in the Appendix to this Petition, pp. 23-25. The prior opinion of the Court of Appeals is printed as *Rymer* v. *Davis,* 754 F. 2d 198 (1985), and is reprinted

in the Appendix to this Petition, pp. 27-33. The prior judgment of the United States District Court for the Western District of Kentucky, entered May 26, 1983, is unpublished and is reprinted in the Appendix to this Petition, pp. 34, 35.

JURISDICTION

The judgment of the Court of Appeals was entered October 28, 1985. The jurisdiction of this Court is invoked pursuant to 28, United States Code, Section 1254(1).

JURISDICTION ON WRIT OF CERTIORARI
Rule 17
CONSIDERATIONS GOVERNING REVIEW ON CERTIORARI .1(a)(b)(c)

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATUTORY PROVISION INVOLVED

The case involves Title 42, United States Code, Section 1983, which provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

This is a civil rights action originally brought by Paul Dale Rymer against the City of Shepherdsville, Kentucky, Ben Stillwell, and numerous other Defendants pursuant to 42 USC §1983.

The circumstances leading up to the bringing of the above referenced action and its progressing to trial are as follows:

On June 13, 1979, the Respondent along with numerous other individuals was traveling along Interstate 71 and Interstate 65 in the State of Kentucky. Respondent, in his journey across Kentucky, became involved in a protest action being carried on by various truck drivers on the highways this day.

It is undisputed by any party that the Respondent was a truck driver, who on this day was involved in what is commonly termed a convoy traveling from northern Kentucky to a point south of Shepherdsville, Kentucky, where the convoy was stopped by law enforcement officials.

There is some disagreement as to the Respondent's position in this convoy, but, this has no relevance to the action brought against these Petitioners.

The convoy was halted by the joint actions of some Kentucky State Police, some police of the City of Shepherdsville, some police of the City of Lebanon Junction, some police of the Bullitt County Police force.

At the scene of this police stoppage the Respondent, as well as three other truck drivers, was arrested on various charges, some filed by the Kentucky State Police, some filed by various City Police Officers.

Respondent received the injuries he complained of at the scene of his arrest. He, as well as the other arrested parties, was taken to Shepherdsville, the county seat, where the County Jail is located. At this

time, Respondent was offered medical treatment by an EMS Technician and then lodged in the jail for the night.

On the following morning Respondent, as well as the other arrested individuals, was taken before the Honorable Judge Fredric N. Friske, Judge of the Bullitt District Court to enter his plea. After this was done all were released, and the Respondent returned to his home in Tennessee.

On a later occasion the Respondent returned to Kentucky for a trial before the Bullitt Circuit Court on some of the charges brought against him by the Kentucky State Police. At that trial he was found guilty of menancing by a jury, and a punishment was set. At no time have the charges filed by the Petitioner, Stillwell, ever been heard by any court.

This action was filed in the United States District Court for the Western District of Kentucky on June 12, 1980, at which time the Petitioner, Stillwell, was not named as a party defendant. He was, however, subsequently joined on July 7, 1980, by the Respondent's First Amended Complaint which was permitted to be filed pursuant to order of Court dated July 24, 1980.

This action came on for trial in the District Court on May 23rd, 24th, and 25th, 1983. Prior to this time numerous Defendants had been dismissed by the Court and various claims of the Respondent had been dismissed.

The testimony presented by Petitioner at trial, which was the only evidence as to custom, policy or practice of the Petitioner, City, was that since 1975, in

compliance with Kentucky Revised Statutes, all police officers employed were required to attend training which was conducted by the Kentucky Department of Justice, Bureau of Training.

The Petitioner, Stillwell, had attended and successfully completed these required classes for four (4) years prior to this incident in 1979.

Also during his nine (9) years of employment as a police officer, the Petitioner, City, had not received one (1) complaint as to his treatment, practices or procedures in the handling of prisoners or the public in the conduct of his duties as a police officer.

At the trial of this action, before it was given to the jury, the Court directed a Verdict in favor of three (3) other Defendants. The Court allowed the jury to consider the issues as to the two (2) Petitioners herein; and the Judgment was thereupon entered on May 26, 1983.

Subsequent motions for a new trial or a Judgment Notwithstanding the Verdict by both Petitioners were overruled.

REASON FOR GRANTING THE WRIT

The judgment of the Court of Appeals in this case directly conflicts with the Opinion of the United States Supreme Court in *City of Oklahoma City* v. *Tuttle,* 471 U. S. —— 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985), holding that proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell unless proof of the incident includes proof that it was caused by an existing, unconstitutional munici-

pal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional policy and its origin must be separately proved. But when the policy relied upon is not itself unconstitutional, considerable more proof than a single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

The judgment of the Court of Appeals in this case directly conflicts with the Opinion of the United States Supreme Court in *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658, 56 L. Ed. 611, 98 S. Ct. 2018 (1978), holding that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort, and a municipality cannot be held liable under §1983 on a respondent superior theory.

Also, its opinion directly conflicts with *Owen* v. *City of Independence,* 445 U. S. 622 (1980), which states when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983. And *Rizzo* v. *Goode,* 423 U. S. 362 (1976), which requires a direct causal link between the acts of the individual officer and the supervisor defendants.

The Court of Appeals in this case is directly in conflict with its own opinion in *Hays* v. *Jefferson County, Kentucky,* 668 F. 2d 869 (1982), holding that case law

has limited §1983 so as not to reach isolated instances where a negligent failure to adequately supervise, train or control was involved.

Petitioners further respectfully submit that the Court of Appeals in this case has misconstrued the holdings of *Carey* v. *Piphers,* 435 U. S. 247 (1978); *Boyd* v. *Madison County Mutual Ins. Co.,* 653 F. 2d 1173 (7th Cir. 1981); *Sengel* v. *Belcher,* 522 F. 2d 438 (6th Cir. 1975); *Smith* v. *Heath,* 691 F. 2d 220 (6th Cir. 1982); and *Wheatley* v. *Ford,* 679 F. 2d, 1037 (2nd Cir. 1982).

Based on the foregoing, it appears the Sixth Circuit Court of Appeals "has rendered a decision in conflict with the decision of another Federal Court of Appeals on the same matter, . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision"; or "When . . . a federal court of appeals has decided federal questions in a way in conflict with applicable decisions of this Court." Rule 17.1(a)(c), Rules of the Supreme Court of the United States.

Did The United States Court of Appeals For The Sixth Circuit Commit Error in Affirming a Judgment For The Respondent on The Basis That The Petitioner, City of Shepherdsville, Kentucky, Either Failed to Train its Police Officers or Trained Them in Such a Reckless or Grossly Negligent Manner That The Misconduct Alleged Was Inevitable or Substantially Certain to Result, When Respondent Failed to Plead or Prove This as a Cause of Action?

The Court of Appeals completely ignored what Respondent had pled in his Complaint for relief.

Before looking into the precedents, this Court should look closely at the Complaint and First Amended Complaint filed in this action. The pertinent parts of these pleadings are as follows:

Complaint, Paragraph Seven (7):

The City of Shepherdsville, acting by and through its duly elected Mayor, James T. Sparrow, is a constitutional entity authorized by act of the legislature of the Commonwealth of Kentucky, was the employer of the Defendants, Bobby Dennis and Mike Nalley and, as such, is directly responsible for any judgment rendered herein against Bobby Dennis and Mike Nalley, jointly and severally.

First Amended Complaint, Paragraph Eight (8):

The City of Shepherdsville, acting by and through its duly elected Mayor, James T. Sparrow, is a constitutional entity authorized by act of the legislature of the Commonwealth of Kentucky, was the employer either directly or by deputation of the Defendants, Bobby Dennis, Mike Nalley and Ben Stillwell, and as such, is directly responsible for any judgment rendered herein against Bobby Dennis, Mike Nalley or Ben Stillwell, jointly and severally.

This Court should look closely at these pleadings to determine exactly what has been pled. If this strictly sounds under the theory of Respondeat Superior, this Court has previously ruled there was no recovery under this theory, therefore, this issue should not have been allowed to go to the jury as to the Petitioner, City of Shepherdsville.

If, however, this Court interprets these clauses to raise some unconstitutional official policy on the Petitioner's, City of Shepherdsville, part, then that unconstitutional official policy must be the training and retention of the Petitioner, Stillwell, as a police officer of the City.

This issue has been dealt with in numerous federal courts, and a history of their holdings is as follows: *Monell* v. *New York City Dept. of Social Services,* 436 U. S. 658 (1978)

> "On the other hand, the language of §1983 read against the background of the same legislative history compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular we conclude that a municipality cannot be held liable solely because it employs a tort feasor or in other words, a municipality cannot be held liable under §1983 on a respondeat superior theory.

We being with the language of §1983 as passed:

> *Any person who,* under color of any law, statute, ordinance, regulation, custom or usage of any State, *shall subject, or cause to be subjected,* any person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.'

> The italicized language plainly imposes liability on a government that under color of some official policy "causes" an employee to violate another's constitutional rights. At the same time, that language cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer employee relationship with a tort feasor. Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggest that Congress did not intend §1983 liability to attach where such causation was absent."

Also in Monell, ibid, this Court concluded as follows:

> "We conclude, therefore, that a local government may not be sued under §1983 for an injury inflicted solely by its employee or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government, as an entity, is responsible under §1983."

This was subsequently cited with approval in *Owen* v. *City of Independence,* 445 U. S. 622 (1980).

The only testimony or evidence as to official policy of the City of Shepherdsville, was provided by Mayor James T. Sparrow and Officer Ben Stillwell. The policy of the City was and is to put trained officers on the street. There is no showing in the evidence at trial that any other policy, custom, or anything else that "caused" any employee to violate the rights of another. In point of fact, it is the established policy

of Petitioner, City, to train its employees to protect the rights of individuals and no other policy was shown or attempted to be shown.

The most recent decision by this court which follows this line of cases and cites then with approval is *City of Oklahoma City* v. *Tuttle,* 471 U. S. ———, 85 L. Ed. 2d 791, 105 S. Ct. 2427, (1985). In that action the court stated:

> In the first place, the word "policy" generally implies a course of action consciously chosen from among various alternatives; it is therefore difficult in one sense even to accept the submission that someone pursues a "policy" of "inadequate training", unless evidence be adduced which proves that the inadequacies resulted from conscious choice—that is, proof that the policymakers deliberately chose a training program which would prove inadequate. And in the second place, some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in Monell will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, Rotramel would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force. But Monell must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy". At the very least there must

> be an affirmative link between the policy and the particular constitutional violation alleged.

This theory has been applied in another case, *Rizzo* v. *Goode,* 423 U. S. 362 (1976), wherein this Court stated:

> "There must be a direct causal link between the acts of the individual officer and the supervisor defendants" . . . "It is essentially the same concept that requires the implementation or execution of a government policy or custom be shown before liability can be imposed on a municipality."

One of the leading cases in the Sixth Circuit on this issue is the case of *Hays* v. *Jefferson County, Ky.,* 668 F. 2d 869 (1982). That Court established some guidelines for the imposition of liability on a municipality, as follows:

> The major impediment to simple negligence as a basis for liability of supervisory officials and municipalities, however, is the Supreme Court's decision in *Rizzo* v. *Goode,* 423 U. S. 362, 97 S. Ct. 598 46 L. Ed. 2d 561 (1976).

The Petitioner, City of Shepherdsville, as well as most other cities in Kentucky, avails itself of the services of the State in providing training for its police officers.

This is done partly because of 42 U.S.C. §1983, and partly because Kentucky law requires. The training facilities are established and administered by the State of Kentucky. The Court of Appeals seems to base its decision somewhat upon the fact that Petitioner, Still-

well, had no specific class or training on arrest procedures. Are the Courts now going to dictate the course of study necessary to comply with the policies of 42 U.S.C. §1983? Would all training be considered null and void because a specific class were not taught? Does it mean nothing as to the liability of the City that schooling is required and no prior complaints have been received? Must each City across the United States attempt to establish a comprehensive training facility which will teach policemen how to react in all circumstances, or is there some reason to believe that attendance at the only State run training facility should be adequate? This situation appears somewhat analogous to that in *Polk County* v. *Dodson,* 454 U. S. 312 (1981). Are the Courts of this country going to dictate how government is to be run, what schools our police are to attend, what classes they are to take, what performance level is to be attained before successful completion? Or should the local government be allowed to establish a policy, which was here proven and unrefuted, and operate under that policy, or with the supervision of each individual detail by the Courts? Should the Court exercise some judicial restraint when interfering with established City policy because they do not like the classes offered by the State for training? The Court had not previously held the State offered training inadequate or inappropriate, but by this decision that seems to be its impact. Now what are the majority of cities in Kentucky to do for proper training of their police officers?

The Sixth Circuit in *Hays,* ibid, said:

> Where, as here, the constitutional violation was not alleged to be part of a pattern of past misconduct, a supervisory official or a municipality may be held liable only where there is essentially a complete failure to train the police force or training that is so reckless or grossly negligent that future police misconduct is almost inevitable, e.g. *Leite* v. *City of Providence,* 463 F. Supp. at 590, or would properly be characterized as substantially certain to result. *Rheuark* v. *Shaw,* 477 F. Supp. 897 (N. D. Texas 1979).

This Court has established some guidelines to help the lower federal courts in this type situation. There must be a complete failure to train which is not the case presented. The issue of what type training was not at issue at trial in chief, and in fact was not pled in the original or first amended complaints.

The Court further goes on to state if there is training, it must be so reckless or grossly negligent that future police misconduct is almost inevitable.

Let us look to the specific guidelines established by the Court of reckless or grossly negligent.

Blacks Law Dictionary, Revised Fourth Edition 1968, defines reckless: not recking, careless, heedless, inattentive; indifferent to consequences. According to circumstances it may mean desperately heedless, wanton or willful, or it may mean only careless, inattentive, or negligent.

Blacks Law Dictionary (ibid) defines grossly negligent: The intentional failure to perform a manifest

duty in reckless disregard of the consequences as affecting life or property of another; such a gross want of care and regard for the rights of others as to justify the presumption of willfulness and wantonness.

The Respondent in no way proved that the Petitioner, City of Shepherdsville, fell within these guidelines. In fact, it can be seen that the Petitioner, City, was attempting to carry out its duty to provide trained individuals to enforce the law.

Hays (ibid) also states:

> Failure of supervisory officials to supervise, control or train offending individual officers is not actionable absent showing that official either encouraged specific incident of misconduct or in some other way directly participated in it; at minimum plaintiff must show that official at least implicitly authorized, approved or knowingly acquiesced in unconstitutional conduct of offending officer.

Consider these guidelines with the *Rizzo* (ibid) holding:

> there must be a direct causal link between the acts of the individual officers and the supervisory defendants''

and this court will see that based on the pleadings this cause of action was not pled, and based on the precedents the Petitioner, City, has not failed in such a manner as to fall within the guidelines established for liability.

This entire argument and its proper outcome were set forth by the Sixth Circuit Court in *Hays* (ibid),

The language and history of §1983 are silent as to whether supervisory officials and municipalities can be held liable for negligently having failed to adequately train, supervise, and control individual police officers who violate a plaintiff's constitutional rights. The language of §1983 providing that a person who "subjects, or causes to be subjected" another to a deprivation of constitutional rights appears on its face to be broad enough to encompass merely negligent deprivations. The broad potential of this language is bolstered to some extent also by the Supreme Court's declaration that "[s]ection [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape,* 365 U. S. 167, 187, 81 S. Ct. 473, 484, 5 L. Ed. 2d 492 (1961). The trend of the case law, however, has not been in this direction. Rather, the case law has limited §1983 so as not to reach isolated instances where a negligent failure to adequately supervise, train, or control was involved. See, e.g., *Jamison* v. *McCurrie,* 565 F. 2d 483 (7th Cir. 1977); *Bonner* v. *Coughlin,* 545 F. 2d 565 (7th Cir. 1976) (en banc); *Parker* v. *McKeithen,* 488 F. 2d 553 (5th Cir.), cert. denied, 419 U. S. 838, 95 S. Ct. 67, 42 L. Ed. 2d 65 (1974); *Edmonds* v. *Dillin,* 485 F. Supp. 897 (N. D. Ohio 1980); *Rheuark* v. *Shaw,* 477 F. Supp. 897 (N. D. Texas 1979); *Leite* v. *City of Providence,* 463 F. Supp. 585 (D. R. I. 1978); *Schweiker* v. *Gordon,* 442 F. Supp. 1134 (E. D. Pa. 1977); cf. *Rizzo* v. *Goode,* 423 U. S. 362, 370-71, 96 S. Ct. 598, 603-604, 46 L. Ed. 2d 561 (1976). But see, *Carter* v. *Carlson,* 144 U. S. App. D. C. 388, 447 F. 2d 358 (D. C. Cir. 1971), rev'd on other grounds sub mom., *Dis-*

> *trict of Columbia* v. *Carter*, 409 U. S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1973).
>
> A major part of the doctrinal foundation for requiring a higher degree of culpability than ordinary negligence is the concern that such a standard would unduly impede or circumscribe the performance of official duties. The courts look for some proof that a defendant has a culpable state of mind—that the action or failure to act was to some degree deliberate rather than inadvertent. The verbal formulations of this concept have varied from gross negligence or recklessness, *Owens* v. *Haas*, 601 F. 2d 1242 (2nd Cir. 1979); *White* v. *Rochford*, 592 F. 2d 381 (7th Cir. 1979); *Jenkins* v. *Averett*, 424 F. 2d 1228 (4th Cir. 1970); *Leite* v. *City of Providence*, 463 F. Supp. 585 (D. R. I. 1978); *Schweiker* v. *Gordon*, 442 F. Supp. 1134 (E. D. Pa. 1977); *Perry* v. *Elrod*, 436 F. Supp. 299 (N. D. Ill. 1977), to actions or failures to act which, though not intended to harm the plaintiff, were so likely to violate plaintiffs' rights and cause them injury that the harm was "substantially likely to result," *Rheuark* v. *Shaw*, 477 F. Supp. 897 (N. D. Texas 1979), to "purposeful non-feasance" in the face of a duty to act, see *Bonner* v. *Coughlin*, 545 F. 2d 565 (7th Cir. 1976), to an apparent requirement of intent, see *Edmonds* v. *Dillin*, 485 F. Supp. 722 (N. D. Ohio 1980), but in practical terms the underlying concept appears to be similar in the vast majority of the cases.

The *Tuttle* (ibid) decision completely and thoroughly deals with the issue here in question and follows the prior rulings of this Court in the parameters set forth for liability pursuant to 42 U.S.C. §1983.

The Court set forth there must be a policy and defines what constitutes a policy. It sets forth a specific standard which must be followed if precedent is to be of any use in the law. The Court stated in *Tuttle* (ibid):

> We think this inference unwarranted; first, in its assumption that the act at issue arose from inadequate training, and second, in its further assumption concerning the state of mind of the municipal policymakers. But more importantly, the inference allows a §1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker. The foregoing discussion of the origins of Monell's "policy or custom" requirement should make clear that, at the least, that requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers. Presumably, here the jury could draw the stated inference even in the face of uncontradicted evidence that the municipality scrutinized each police applicant and met the highest training standards imaginable. To impose liability under those circumstances would be to impose it simply because the municipality hired one "bad apple."

Since this is now the guideline which must be followed by the United States Court of Appeals for the Sixth Circuit and which was not in its decision of this case, this Court must exercise its function to require this federal court to abide by the precedent established by this Court. To allow this Court to rule as it has

would be to destroy the supremacy of this Court which the rules require.

All of the above cited precedents, however, were completely disregarded by the Court of Appeals in deciding this case, and this must not be permitted.

CONCLUSION

For all the reasons, and upon the authorities cited and argued in this, their Petition, the Petitioners respectfully pray that a writ of certiorari be granted.

January 15, 1986.

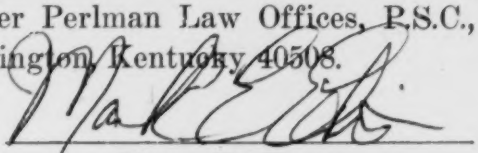
Respectfully submitted,

MARK E. EDISON
PORTER & EDISON
217 Buckman Street
Shepherdsville, Kentucky 40165
Telephone: (502) 543-2296

Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Mark E. Edison, a member of the Bar of this Court, representing the Petitioners herein, do hereby certify that I have this 15th day of January, 1986, served the foregoing Petition for Writ of Certiorari pursuant to Rule 28.3 of this Court upon all parties required to be served to wit: Hon. Harley N. Blankenship and Hon. Peter Perlman, by depositing three (3) copies of the said Petition in a United States mailbox with first class postage prepaid, addressed to Hon. Harley N. Blankenship, 515 Kaufman-Straus Building, Louisville Galleria, Louisville, Kentucky 40202, and Hon. Peter Perlman, Peter Perlman Law Offices, P.S.C., 388 South Broadway, Lexington, Kentucky 40508.



MARK E. EDISON

APPENDIX

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-5586

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL D. RYMER, - - - - *Plaintiff-Appellee,*

v.

TROOPER H. A. DAVIS, et al., - - - *Defendants,*
CITY OF SHEPHERDSVILLE, KENTUCKY,
AND BEN STILLWELL, - - *Defendants-Appellants.*

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed October 28, 1985

Before: KEITH and JONES, Circuit Judges; and POTTER, District Judge.*

JONES, Circuit Judge. The United States Supreme Court has vacated our decision in *Rymer* v. *Davis,* 754 F. 2d 198 (6th Cir. 1984), and remanded that case to us for reconsideration in light of *City of Oklahoma City* v. *Tuttle,* 105 S. Ct. 2427 (1985). *See City of Shepherdsville* v. *Rymer,* 105 S. Ct. 3518 (1985). Upon thorough reconsideration, we reaffirm and incorporate by reference our previous decision.

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*The Honorable John W. Potter, District Judge, United States District Court for the Northern District of Ohio, sitting by designation.

The issue in *Tuttle* was specifically limited to the question of "[w]hether a single isolated incident of the use of excessive force by a police officer establishes an official policy or practice of a municipality sufficient to render the municipality liable for damages under 42 U.S.C. § 1983." 105 S. Ct. at 2431 n.2. The Supreme Court reversed the Court of Appeals' affirmance in *Tuttle* because the jury instructions permitted the jury to "infer" from "a single, unusually excessive use of force . . . that it was attributable to inadequate training or supervision amounting to 'deliberate indifference' or 'gross negligence' on the part of the officials in charge." *Id.* at 2435. The Court noted that there existed independent evidence of the inadequate training but stated that "unfortunately for respondent, the instructions given by the District Court allowed the jury to impose liability on the basis of such a single incident without the benefit of the additional evidence." *Id.* The Court found that the jury instructions permitted the plaintiff to establish municipal liability without any proof of fault on the part of the municipality. *Id; see also id.* at 2440 (Brennan, J., concurring).

In the instant case, the jury was instructed:

> If you find for the plaintiff with regard to his claim of excessive force, then you will consider the claim of excessive force, then you will consider the claim made by him against the City of Shepherdsville; and if you find from the preponderance of the evidence that the City of Shepherdsville trained its police officers in a way that was so reckless or grossly negligent that future police misconduct was almost inevitable or would be properly characterized as substantially certain to result, then you shall find for the plaintiff against the City of Shepherdsville.

Thus, the City of Shepherdsville was found liable based upon a finding by the jury that the City of Shepherdsville inadequately trained its police officers. No inference from a single incident of excessive force was involved. Consequently, the City was not held liable because it "hired 'one bad apple,'" *id.* at 2435, but because the City was itself a bad actor in failing to train its police force. Consequently, *Tuttle* is not controlling; rather, this case presents the exact issue upon which the Court refused to express an opinion. *See id.* at 2436 n.7. We emphasize again, however, that our decision is not based on an inference but is based on all the facts and instructions set forth in our original disposition of this case.

Accordingly, upon reconsideration we reaffirm and incorporate our previous opinion.

July 1, 1985

[LETTERHEAD] OF THE SUPREME COURT OF THE UNITED STATES

Mr. Mark E. Edison
217 Buckman Street
Shepherdsville, KY 40165

Re: City of Shepherdsville, Kentucky, et al., v.
Paul Dale Rymer
No. 84-1756

Dear Mr. Edison:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of City of Oklahoma City v. Tuttle, 472 U. S. _____ (1985)

Very truly yours,

(s) Alexander L. Stevas
Alexander L. Stevas, Clerk

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-5586

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL D. RYMER, - - - - *Plaintiff-Appellee,*

v.

TROOPER H. A. DAVIS, et al., - - - *Defendants,*
CITY OF SHEPHERDSVILLE, KENTUCKY,
AND BEN STILLWELL, - - *Defendants-Appellants.*

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed February 11, 1985

Before: KEITH and JONES, Circuit Judges; and POTTER, District Judge.*

JONES, Circuit Judge. This appeal presents the issue of whether a city may be liable under 42 U.S.C. §1983 (1982) when the city has failed to train its police officers or has trained its police officers in a way that was so reckless or grossly negligent that future police misconduct is almost inevitable or substantially certain to result. We hold that under the circumstances of this case, it was not error to find the city liable for such a failure.

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*The Honorable John W. Potter, District Judge, United States District Court for the Northern District of Ohio, sitting by designation.

On June 13, 1979, Paul Dale Rymer participated in a convoy on an interstate in Kentucky. The convoy was stopped by law enforcement officials of the State of Kentucky, the City of Shepherdsville, the City of Lebanon Junction, and Bullitt County. Rymer and three other truck drivers were arrested. Officer Ben Stillwell beat and kicked Rymer violently during the arrest. Rymer was treated by an emergency medical technician who recommended that Rymer be taken to a hospital. Officer Stillwell rejected this recommendation. Rymer and the others were jailed for the night. The next morning the arrested individuals were taken to the county court to enter their pleas. They were then released.

Rymer subsequently filed a complaint in the district court under 42 U.S.C. § 1983. The complaint named numerous defendants. The court dismissed the complaint as to some of the defendants and directed a verdict as to the other defendants except Officer Stillwell and the City of Shepherdsville (City). The jury returned a verdict against Stillwell for $32,000 as compensatory damages and $50,000 as punitive damages and against the City for $25,000 as compensatory damages. A judgment was entered upon that verdict on May 26, 1983. The defendants' motions for both a new trial and judgment notwithstanding the verdict were denied. Both defendants appeal and argue that the amount of the award is excessive. Further, the City argues that the district court erred by not dismissing the City prior to submitting the case to the jury and, alternatively, argues that its motion for judgment notwithstanding the verdict should have been granted.

The City's contention must be treated as a request for a new trial because the City did not move for a directed verdict and, therefore, judgment nothwithstanding the verdict in favor of the City would have been inappropriate. A party against whom a verdict is rendered must comply

with Federal Rule of Civil Procedure 50 to obtain appellate review of a claim that he is entitled to judgment as a matter of law. If a party moves for judgment notwithstanding the verdict after having failed to move for a directed verdict at the close of the evidence, an appellate court cannot order judgment for him. Fed. R. Civ. P. 50(b); *see Trotter* v. *Todd*, 719 F. 2d 346, 350 (8th Cir. 1983). If the evidence was insufficient as a matter of law, however, the court can order a new trial. C. Wright & A. Miller, Federal Practice and Procedure §§ 2537, 2540. Because the City is arguing that the evidence was insufficient as a matter of law, we will treat the City's argument as a request for a new trial.

The evidence viewed most favorably to the non-moving party, Rymer, showed that during Rymer's arrest, Stillwell beat and kicked Rymer many times and hit Rymer once in the stomach and head with a nightstick. Stillwell refused to accept an emergency medical technician's suggestion that Rymer needed x-rays. Evidence of the injuries included photographs and the testimony of Rymer, the jailer, and the Bullitt County Sheriff. The evidence further showed that, at the time of the incident, the City had no rules or regulations governing its police force. Nor did the City require any pre-employment training. The initial training received by the officers was on-the-job training. Although the City required the officers to complete forty hours of training each year after being hired, none of the training received by Officer Stillwell instructed him on arrest procedures or treatment of injured persons. The City's police officers used their own discretion in the arrest and treatment of persons suspected of criminal activity.

The theory of liability put before the jury in this case was that it should find for the plaintiff, Rymer, if it found by a preponderance of the evidence that the City trained its police officers in a way that was so reckless or grossly negligent that future police misconduct was almost inevi-

table or substantially certain to result. This theory of liability conforms to our decision in *Hays* v. *Jefferson County,* 668 F. 2d 869 (6th Cir. 1982), *cert. denied,* 103 S. Ct. 75 (1983). In *Hays,* we held that "a municipality may be held liable only where there is essentially a complete failure to train the police force, or training that is so reckless or grossly negligent that future police misconduct is almost inevitable . . . or would properly be characterized as substantially certain to result . . . ." *Id.* at 874 (citations omitted). *Hays* has since been questioned by a number of courts because of our failure to recognize negligence as a basis for liability of supervisory officials and municipalities. *Branden* v. *Allen,* 719 F. 2d 151, 153-54 (6th Cir. 1983); *Lopez* v. *Ruhl,* 584 F. Supp. 639, 649 & n.7 (W. D. Mich. 1984); *Means* v. *City of Chicago,* 535 F. Supp. 455, 462 (N. D. Ill. 1982); *see also Hirst* v. *Gertzen,* 676 F. 2d 1252, 1263 (9th Cir. 1982). Because the district court instructed the jury on gross negligence, we are not presented with the question of negligence as a basis for liability.

We are, however, presented with the question of whether the City's failure to train its police officers regarding arrest procedures was a proper basis for liability. In *Monell* v. *Department of Social Services,* 436 U. S. 658, 694 (1978), the Supreme Court held that a municipality may be held liable under section 1983 if either a municipality's official policy or one of its customs is the source of the injury. The Court noted that the case unquestionably involved official policy and that it, therefore, had no need to address the full contours of municipal liability under section 1983. *Id.* at 694-95.

To prevail against the City, Rymer had to show that he was deprived of a constitutional right either as a result of a "policy statement, ordinance, regulation, or decision adopted and promulgated by the City's governing body" or as a result of a "governmental 'custom' even though such a

'custom' had not received formal approval through the City's official decisionmaking channels." *Williams* v. *Butler*, 746 F. 2d 431, 435 (8th Cir. 1984) (quoting *Monell*, 436 U. S. at 691). In *Hays*, 668 F. 2d at 874, this Court joined a number of courts that have interpreted *Monell* to hold that a municipal custom that authorizes or condones police misconduct can be inferred when the municipality has failed to train or has been grossly negligent in training its police force.[1] *See, e.g., Herrera* v. *Valentine*, 653 F. 2d 1220, 1224 (8th Cir. 1981); *Owens* v. *Haas*, 601 F. 2d 1242, 1246-47 (2d Cir.), *cert. denied*, 444 U. S. 980 (1979); *Popow* v. *City of Margate*, 476 F. Supp. 1237, 1245-46 (D. N. J. 1979); *Leite* v. *City of Providence*, 463 F. Supp. 585, 590-91 (D. R. I. 1978); *see also Means* v. *City of Chicago*, 535 F. Supp. 455, 462-63 (N. D. Ill. 1982). Further, we implicitly agreed with the Second Circuit, *Owens*, 601 F. 2d at 1246-47, that official acquiescence may be inferred from the lack of training even in the fact of only a single brutal incident of police misconduct. *Hays*, 668 F. 2d at 870-71, 874; *see also Leite*, 463 F. Supp. at 590. *Contra Gilmere* v. *City of*

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[1]The type or amount of training necessary to avoid the inference of a custom that authorizes or condones police misconduct is properly a jury question. We note, however, that numerous resources are available to municipalities to guide them in supervising police officers and in preventing instances of police brutality. *See e.g.*, George C. Edwards, *The Police on the Urban Frontier: A Guide to Community Understanding* (1968); Report of the National Advisory Commission on Civil Disorder (1968); D. Hanna, *A Guide to Primary Police Management Concepts* (1971); Institute on Police Management for Supervisory and Administrative Personnel, *Police Management for Supervisory and Administrative Personnel* (1963); L. O'Donnell, *Deadly Force: The True Story of How A Badge Can Become A License to Kill* (1983); L. O'Leary, *The Selection and Promotion of the Successful Police Officer* (1979); H. Russell, *Understanding Human Behavior for Effective Police Work* (1976); P. Whisenand, *The Effective Police Manager* (1981).

Atlanta, 737 F. 2d 894, 904 (11th Cir. 1984); *Languirand* v. *Hayden,* 717 F. 2d 220, 227 (5th Cir. 1983).

It is not enough, however, that the plaintiff demonstrate a general failure to train. There must exist a causal relationship between the failure to train and the conduct of the police officer. *See Means* v. *City of Chicago,* 535 F. Supp. 455, 462 (N. D. Ill. 1982) (while evidence of a failure to provide crowd control training might be relevant to a charge of overreaction to crowd hostility, it would have no bearing on an incident involving a single victim). In the instant case, the plaintiff proved that the City had a custom of allowing its police officers to determine when and how to arrest without the benefit of supervisory regulations. The City gave its officers carte blanche authority to do as they wished during an arrest. *See Williams* v. *Butler,* 746 F. 2d 431 (8th Cir. 1984) (city had custom of giving judges carte blanche authority in making personnel decisions and are liable for constitutional injuries arising therefrom). Further, Officer Stilwell had received no training on arrest procedures or the treatment of injured persons. The City's failure to train its police officers and the City's bestowal of carte blanche authority to its police officers were directly related to the ultimate abuse Rymer received during the arrest. Consequently, Rymer had introduced sufficient evidence to go to the jury. The jury obviously concluded that the training received by Stillwell, or the lack of it under the circumstances, was so reckless or grossly negligent that future police misconduct was almost inevitable or substantially certain to result. Because this finding is supported by the evidence, we uphold the jury verdict.

Both the City and Stillwell argue that the amount of the verdict was excessive. We disagree with the contention that "the trial court abused its discretion by granting an award so large as to shock the judicial conscience," *Thompson* v. *National Railroad Passenger Corp.,* 621 F. 2d 814,

827 (6th Cir.), *cert. denied,* 449 U. S. 1035 (1980), and thus do not so find.

Accordingly, the judgment below is AFFIRMED.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action No. 80-0309 L(A)

PAUL DALE RYMER

v.

MIKE NALLEY
LANNY BAKER
CITY OF SHEPHERDSVILLE, KENTUCKY
BEN STILLWELL
CITY OF LEBANON JUNCTION

JUDGMENT

This action having been tried before a jury on May 23, 24, 25, 1983, the Court having ruled on the motions of counsel, and the Jury having returned its verdict on May 25, 1983,

IT IS ORDERED AND ADJUDGED that this action be and it is hereby DISMISSED as against defendants City of Lebanon Junction, Kentucky, Mike Nalley, and Lanny Baker.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff recover from the defendant Ben Stillwell $32,000.00 as compensatory damages and $50,000.00 as punitive damages, together with interest at the rate of 8.72 per cent until date of payment.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff recover from the defendant City of Shepherdsville, Kentucky, $25,000.00 as compensatory damages, together with interest at the rate of 8.72 per cent until the date of payment.

IT IS FURTHER ORDERED AND ADJUDGED that costs shall be paid by the defendants Stillwell and City of Shepherdsville, Kentucky.

This is a final and appealable judgment and there is no just cause for delay.

May 26, 1983

(s) Charles M. Allen
Charles M. Allen, Chief Judge
United States District Court

Copies to counsel